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June 15, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: February 10, 2004

Case No.: TIA-0050

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) did not find that the Applicant had an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be granted and the matter remanded for further consideration.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act provides for two programs.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Those illnesses include beryllium disease and specified cancers associated with radiation exposure. 42 U.S.C. § 7341l(9). The DOL program also provides $50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u. To implement the program, the DOL has

issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program. 1/

The DOE administers the second program, which does not itself provide any monetary or medical benefits. Instead, it is intended to aid DOE contractor employees in obtaining workers' compensation benefits under state law. Under the DOE program, an independent physician panel assesses whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3). In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3). To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The OWA is responsible for this program and has a web site that provides extensive information concerning the program. 2/

B. Factual Background

The Applicant was a DOE contractor employee at the DOE's Savannah River Site facility. He began working at the site in 1984 at the age of 38; he stopped working in 1997 at the age of 51, when he received a medical termination based on a foot disorder and resulting pain. Record at 12, 101, 540. After he left employment at DOE, the Applicant became ill with pneumonia several times. In 2002, a bout of pneumonia necessitated the removal of the lower part of his right lung.

In his application, the Applicant claimed that his foot disorder was caused by his employment at DOE. During the case development process, he requested that a "lung condition" be added to his application.

The Physician Panel found that the worker had the claimed foot disorder, but did not render a positive determination on that disorder. Instead, the Panel found that the illness was not related to exposure to a toxic substance at DOE. In doing so, the

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1/ *See* www.dol.gov/esa.

2/ *See* www.eh.doe.gov/advocacy.

Panel addressed the Applicant's claim that the disorder was related to standing, walking, and running on the job.

The Panel found that the worker had a lung condition, but did not render a positive determination on that illness. The Physician Panel thoroughly addressed the issue of whether the lung condition was chronic obstructive pulmonary disease (COPD), beryllium disease, asbestosis, or pleural plaques. The Panel found that the Applicant did not have these conditions and discussed those findings in detail. In the narrative explanation of its negative determination on COPD, the Panel found that the Applicant had a serious lung condition but attributed that condition largely to a 2002 illness and surgery rather than a progression of pre-existing borderline restrictive lung disease. The Panel did not expressly address whether it was as least as likely as not that a toxic exposure at DOE was a significant factor in causing, aggravating, or contributing to the worker's lung condition.

The OWA accepted the Physician Panel's determination. *See* OWA January 27, 2004 Letter. The Applicant then filed the instant appeal.

In his appeal, the Applicant maintains that the Physician Panel determination is not correct. The Applicant's arguments are discussed below.

II. Analysis

A. Whether the Panel Determination Meets the Requirements of the Physician Panel Rule

The Physician Panel Rule specifies the matters that a physician panel must address in its determination. The panel must address each claimed illness, make a finding whether that illness was related to exposure to a toxic substance at a DOE facility, and state the basis for that finding. 10 C.F.R. § 852.12.

For the foot disorder, the Physician Panel determination addressed the matters required by the Rule. The Panel discussed the Applicant's claim that the disorder was related to standing, walking, and running on the job. The Panel found that the illness was not related to exposure to a toxic substance at DOE.

For the claimed "lung condition," Physician Panel determination did not address the matters required by the Rule. The Panel found that

the Applicant has a serious lung condition and it appears to us that the Panel found that the Applicant has restrictive lung disease. Although the Panel discussed this condition in the narrative of its determination on COPD, the Panel did not make the required finding, i.e., whether it is at least as likely as not that exposure to a toxic substance during employment at DOE was a significant factor in causing, aggravating, or contributing to that condition. 10 C.F.R. § 852.12. Because the Panel report did not make the required finding on the Applicant's lung condition, the application should be remanded for further review.

B. Whether the Panel Erred in the Findings That it Did Make

1. Foot Disorder

The Applicant challenges the negative determination on his foot disorder. The Applicant argues that his foot disorder is related to his job at DOE, specifically his standing, walking, and yearly test of running a mile and one-half in a certain time. This argument does not indicate Panel error.

The Physician Panel Rule is limited to illnesses that are related to exposure to a toxic substance. 10 C.F.R. § 852.1(a)(3). Standing, walking, and running are physical activities - not "substances," let alone "toxic" substances. *Id.* § 852.2. Accordingly, the Panel correctly concluded that the disorder was not related to exposure to a toxic substance at a DOE facility.

2. Lung Condition

The Applicant alleges exposure to toxic substances that could cause COPD, CBD, asbestosis, and pleural plaques. The Panel found that the Applicant did not have those illnesses and this finding is consistent with the two letters submitted by the Applicant's pulmonary specialist. See Letters Dated May 13, 2003 and February 18, 2004. Accordingly, there is no basis for finding Panel error with respect to those findings.

The Applicant also argues that the Panel incorrectly attributed his lung condition to his 2002 illness and surgery. The Applicant supplies a February 18, 2004 letter from his pulmonary specialist, which states that the Applicant's pulmonary function tests declined after his DOE employment but prior to the illness and surgery, thereby indicating that his lung disease pre-dated his 2002 illness and surgery.

The February 18, 2004 letter contains new information that the Panel did not have a chance to consider. The record sent to the Panel did not contain the results of any pulmonary function tests between 1997, when the Applicant's employment at DOE ended, and the fall of 2002, when the Applicant became ill with pneumonia and had surgery. Thus, the record did not contain the pulmonary function tests referred to in the February 18, 2004 letter. This new information should be included in the record of any subsequent review.

Finally, we note that the Panel did not address the Applicant's claim that his lung condition is the result of the smoking of a co-worker, i.e., secondhand smoke. We see nothing in the statute or the Rule to suggest that Congress intended the phrase "toxic substance" to extend to smoke produced by the tobacco use of co-workers. Accordingly, there was no reason for the Panel to consider this claimed exposure.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0050 be, and hereby is, granted as set forth in Paragraph 2.

(2) The Application that is the subject of this Appeal is remanded for further consideration.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 15, 2004